No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JOHN H. ALDEN, *et al.*,
Petitioners,
v.
STATE OF MAINE,
Respondent.

On Petition for a Writ of Certiorari to the Maine Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state court refuse to entertain a federal statutory private party cause of action against a State or a state agency—such as the present state employee action against the State of Maine under the overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* —on the basis of state sovereign immunity?

2. If a state court may properly refuse to entertain such a federal statutory private party action on the basis of state sovereign immunity in certain circumstances but not in others, may a state court do so in the circumstance in which that court entertains analogous state statutory actions?

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs-Appellants below are John H. Alden, Walter Anderson, Lawrence D. Austin, Cynthia Ayer, David M. Barrett, Douglas L. Boothby, Nancy Bouchard, Randolph E. Brown, Elizabeth A. Buxton, Susan A. Carey, Richard E. Charest, David E. Cyr, Francis R. Cyr, Peter J. Deane, Joseph S. DeFilipp, Patrick T. Delahanty, Joseph J. Dentico, Daniel Dodge, Maura S. Douglass, Raymond Dzialo, David Eldridge, Scott R. Erickson, E. Donald Finnegan, Pauline N. Flagg, Richard H. Flanagan, William D. Francis, Lewis E. Frey, Richard Godin, Sandria J.C. Griffin, Pauline A. Greaton Gudas, Normand W. Guay, Karen Hartnagle, Alexandria Helms, Alan Hybers, William W. Jackson, Betsy Jaegerman, William H. Jones, Wayne Libby, John H. Lorenzen, Richard E. Manning, Barbara J. Mascetta, Roman Maxsimic, Terry Michaud, Donna M. Miles, Jon A. Mills, Michael R. Morin, Lisa K. Nash, Martha Jo Nichols, Donald Paxton Parsley, Steven Onacki, J. Charles O'Roak, Nancy R. Peck, Susan P. Pierce, Lewis W. Randall, Michael K. Roach, Mark E. Sellinger, Alison B. Smith, David Snyder, Charles D. Strandberg, David G. Summers, Mark W. Warner, Joyce Williams, Francis P. Witts, Allen O. Wright and Corinne Zipps. Defendant-Appellee below is the State of Maine.

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PETITION FOR A WRIT OF CERTIORARI

John H. Alden *et al.*—the plaintiffs in the trial court and the appellants in the court below—respectfully petition for a writ of certiorari to review the decision and judgment of the Maine Supreme Judicial Court in *John H. Alden et al. v. State of Maine*, Com-97-446 (August 4, 1998).

OPINIONS BELOW

The decision of the Maine Supreme Judicial Court in this case is not yet officially reported and is reprinted as Appendix A hereto ("Pet. App."). The decision of the Superior Court for Cumberland County, Maine, in this case is unreported and is reprinted as Appendix B hereto.

JURISDICTION

The Maine Supreme Judicial Court entered judgment on August 4, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

RULE 29.4(b) CERTIFICATION

Since 28 U.S.C. § 2403(a) may apply and the United States is not a party hereto, copies of this *certiorari* petition are being served on the Solicitor General of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 8 of the United States Constitution provides, in pertinent part:

> The Congress shall have Power . . . to regulate Commerce . . . among the several States.
>
> * * * *

Article VI, Clause 2 of the United States Constitution provides, in pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in

every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State.

Section 7(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 207(a)(1) provides, in pertinent part:

> (a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions
>
> (1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 16(b) of the Fair Labor Standards Act, 29 U.S.C. § 216(b) provides, in pertinent part:

> Any employer who violates the provisions of [29 U.S.C.] section 206 or 207 . . . shall be liable to the employee or employees affected in the amount of their . . . unpaid overtime compensation . . . and in an additional equal amount as liquidated damages . . . An action to recover the liability prescribed . . . may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.

STATEMENT OF THE CASE

1. In December, 1992, John Alden, as the first named plaintiff, and a group of other Maine parole and probation officers (hereafter parole officers), filed suit against the State of Maine in the United States District Court for the District of Maine to vindicate their Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, overtime rights. FLSA § 7, in this regard, obligates the States to compensate covered employees at premium rates for hours worked in excess of the applicable statutory threshold. 29 U.S.C. § 207. And, FLSA § 16(b) authorizes employee suits for monetary relief "against any employer (including a public agency) in any Federal or State court of competent jurisdiction." 29 U.S.C. § 216(b).

The District Court sustained the parole officers' claim, in part, holding that they were "law enforcement" employees, 29 U.S.C. § 213(b)(20), entitled to overtime pay under the special provisions that apply to such employees, 29 U.S.C. § 207(k), and not, as Maine contended, exempt "professional" employees, 29 U.S.C. § 213(a)(1). *See, Mills v. Maine*, 853 F.Supp. 551, 552 (D. Me. 1994); 839 F.Supp. 3 (D. Me. 1993).

However, while the parole officers' federal action was pending, and before they received any back pay, this Court decided *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). On the strength of that decision, the District Court dismissed the parole officers' federal court action on Eleventh Amendment grounds, and its ruling was affirmed on appeal. *Mills v. State of Maine*, 1996 WL 400510 (D. Me. July 3, 1996), *aff'd*, 118 F.3d 37 (1st Cir. 1997).

In August 1996, just after the District Court's Eleventh Amendment ruling, the parole officers filed this action against the State of Maine in the Superior Court of Cumberland County, Maine, again alleging that the State had violated the FLSA overtime provisions. The Superior Court dismissed the parole officers' claim as barred by state

sovereign immunity, and did so over the parole officers' argument that the "FLSA, as federal law, is supreme under the Supremacy Clause and must be enforced by state courts." Pet. App. 22a.[1]

The parole officers filed a timely appeal, raising two main points grounded in the Supremacy Clause.[2] *First*, state courts must enforce valid federal laws, such as the FLSA, notwithstanding any claim of state sovereign immunity. *Second*, Maine can not close its courts, on sovereign immunity grounds, to private actions against the State for monetary relief based on a claim under federal law when its courts are open to private actions against the State based on analogous claims under state law.[3]

The Maine Supreme Judicial Court by a 4-2 panel vote affirmed the Superior Court. That court read *Seminole Tribe* to confirm the view—expressed in earlier Maine Supreme Judicial Court decisions[4]—that the Eleventh

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1 The State also argued that the parole officers' claim was barred by the statute of limitations. The Superior Court rejected that argument, and the State did not appeal that ruling to the Maine Supreme Judicial Court.

2 Appellants' Br. at 9-29; Appellants' Reply Br. generally.

3 In Maine, state sovereign immunity is a common-law judicial doctrine. State legislation creating a cause of action for private parties against the State, without anything more, overrides any claim of sovereign immunity. *See, Davies v. City of Bath*, 364 A.2d 1269, 1273 n.3 (Me. 1976) ("We are not bound, as are some jurisdictions, by a constitutional provision which requires sovereign immunity."). As a result, in Maine, the State is subject to suit by its employees under a wide variety of state laws: Maine Wage Statute, 26 M.R.S.A. §§ 664, 670; Maine Whistle Blower Statute, 26 M.R.S.A. § 833; Maine Family Medical Leave Act, 26 M.R.S.A. § 844; Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq.*; Maine Workers Compensation Act, 39-A M.R.S.A. § 101 *et seq.*

4 *Drake v. Smith*, 390 A.2d 541 (Me. 1978); *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980); *Jackson v. State*, 544 A.2d 291 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989); and *Moody v. Commissioner*, 661 A.2d 156 (Me. 1995).

Amendment embodies state sovereign immunity as a "background principle" of the federal Constitution that applies beyond the Amendment's literal terms to bar federal claims advanced in state court where those claims would be barred if brought in federal court. Pet. App. 6a. And, the Maine Court rejected the parole officers' contention that Maine discriminated against federal causes of action; that court reasoned that no Maine statute authorized the *precise* state employee statutory cause of action the parole officers had stated in their FLSA complaint. Pet. App. 6a-7a.[5]

REASONS FOR GRANTING THE WRIT

The Article I legislative powers/state sovereign immunity questions presented by this case—and a myriad of like pending cases—follow on from the Article I/Eleventh Amendment question decided in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996) with the same inevitability as the night follows the day. And, the questions presented here go to the very essence of Congress' law-making authority vis-a-vis the States within the Constitution's federal plan.

The *Seminole Tribe* Court held:

> In overruling [*Pennsylvania v.*] *Union Gas* [Co. 491 U.S. 1(1989)] today, we reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an

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5 The United States filed a brief as *amicus curiae* in support of the parole officers in both the Superior Court and the Maine Supreme Judicial Court. In the court below, the United States' position was that: "Because the [superior] court's ruling effectively invalidates an act of Congress, and because its ruling impairs a crucial enforcement mechanism for enforcing the [FLSA], the United States . . . urge[s] reversal." U.S. Br. at 1.

> area, like the regulation of Indian commerce, that is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States. The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction. [517 U.S. at 71-72; footnote omitted.]

The Fair Labor Standards Act, like many federal statutes, provides for the bringing of suits to enforce the Act by private parties in either a federal court *or* a state court of competent jurisdiction. *See* 29 U.S.C. § 216(b). And, of course, both the Eleventh Amendment and the *Seminole Tribe* decision speak directly only to the scope of the *federal court* jurisdiction over private party suits against a State. Moreover, prior to *Seminole Tribe*, this Court had repeatedly recognized that the Eleventh Amendment has *no* application to federal claims brought against a State in state court. *E.g., Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 204-05 (1991); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 63-64 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 9 n.7 (1980); *Nevada v. Hall*, 440 U.S. 410, 420 (1979).

Against that background, the parole officers in this case—after bringing their FLSA suit in federal court and prevailing on the merits, pre-*Seminole Tribe*, and then being non-suited for lack of federal court jurisdiction, post-*Seminole Tribe*—filed their FLSA claim against the State of Maine in the Superior Court of Cumberland County, Maine. This suit is, moreover, only one of many such post-*Seminole Tribe* suits brought in various state courts. In this case, as in the other similar cases, the State responded by seeking to interpose a sovereign immunity bar to the plaintiffs' federal statutory claims bottomed on the Eleventh Amendment itself, the "background principle

of state sovereign immunity embodied in the Eleventh Amendment," *Seminole Tribe*, 517 U.S. at 72, or on the state law governing private party actions against the State.

This wave of litigation has now generated a direct conflict—predicated on conflicting readings of this Court's decisions—between the decision of the Arkansas Supreme Court in *Jacoby et al. v. Arkansas Department of Education*, 331 Ark. 508, 962 S.W.2d 773 (1998), pet. for cert. filed *sub. nom. Arkansas Department of Education v. Jacoby et al.* (No. 98-04), and the decision of the Maine Supreme Judicial Court here, as well as a set of conflicting intermediate and trial court decisions from eight other states.

The Arkansas Supreme Court in *Jacoby v. Arkansas Dept. of Ed., supra*, rejected the state sovereign immunity claim made therein and did so in reliance on its reading of this Court's decisions. To the same effect see *Whittington v. State of New Mexico Dept. of Public Safety*, No. 19,065 (N.M. Ct. App., September 3, 1998); *Ahern et al. v. State of New York*, No. 80430, 1998 WL 386231 (N.Y. App. Div., July 9, 1998); *Bunch v. Robinson*, 122 Md. App. 437, 712 A.2d 585 (Md. Ct. Spec. App., 1998) pet. for cert. to Maryland Court of Appeals pending; *Raper v. State of Iowa*, No. CL 678918 (District Court for Polk County, October 23, 1997).

In contrast, the Maine Supreme Judicial Court in this case, placing great reliance on the *Seminole Tribe* decision, endorsed the State's sovereign immunity claim and non-suited the parole officers here for a second time. To the same effect see; *Allen v. Fauver*, No. ESX-L-3302-94 (N.J. Super. Ct. Law Div., 1998) on appeal to N.J. Super. Ct. App. Div. No. A-3795-9775; *German v. Wisconsin Dep't of Transportation*, No. 96-CV-1261 (Wis. Circuit Court, March 8, 1997); *cf. Keller v. Dailey*, No. 97 APEDS-658 1997 WL 781897 (Ohio App. 10 Dist. December 16, 1977)

There is, we believe, no need to belabor the sensitivity and difficulty—or the importance—of questions on the interplay between federal authority and state sovereign immunity such as those presented here. The convolutions in the law in this Court from *Chisolm v. Georgia*, 2 Dall. 419 (1793) though the Eleventh Amendment and on to *Seminole Tribe*, as well as the sheer number of decisions by the Court over the years attending to those questions and the continuing close divisions within the Court, make the case in that regard.

We do believe it worthy of emphasis, however, that the decision below goes well beyond *Seminole Tribe* and its precursors in limiting Congress' Article I law-making powers in an area of Congress' plenary authority. The Eleventh Amendment, after all, speaks only to the "Judicial Power of the United States." To be sure, the Court —in delineating that power—has "understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe*, 517 U.S. at 54, quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). And, as a result, the Court has given the Amendment effect to restrict federal court jurisdiction over cases other than those involving the "Article III diversity jurisdiction of the federal courts" that "the text of the Amendment would appear to restrict." *Seminole Tribe*, 517 U.S. at 54.

Be that as it may, it is a qualitatively different matter, we submit, to apply the Eleventh Amendment—or a general "presupposition" of state sovereign immunity that finds even an implicit expression in the Constitution only in the Eleventh Amendment—wholly outside the Article III realm. And, the doctrinal difficulties in that course pale in comparison to those entailed in recognizing an exception to the Supremacy Clause that saves out the state law of sovereign immunity from the otherwise overriding force of a federal statute enacted by Congress pursuant to its enumerated powers.

It is also very much to the point that the decision below denies Congress *all* authority to enact legislation within its enumerated Article I powers that both applies to certain conduct by the States and provides for private party judicial enforcement of the federal rights created thereby. The section of the FLSA providing for such private party enforcement of the Act against a covered State, for example, is rendered a dead letter by the decision below. Thus, that decision, at the very least, places a great strain on the rule of law and on our basic conceptions of due process in the vindication of federal statutory rights.[6]

The sum of the matter is this. The recurring Article I legislative powers/state sovereign immunity questions presented here are sensitive, difficult and important. The Arkansas Supreme Court in the *Jacoby* case and the Maine Supreme Judicial Court in this case have taken opposite positions based on their opposite readings of this Court's decisions. And, there is a split along the same lines in the lower court case law in other States. All this being so, the questions presented here—like the questions presented in *Seminole Tribe*—require this Court's authoritative answer.

I.

An on-going debate has been joined in the state courts, as pre-*Seminole Tribe* federal court suits against a State have been re-filed, and post-*Seminole Tribe* suits are being

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[6] As both the parole officers and the United States pointed out in the court below (see Appellants' Brief at 13 n.6; Appellants' Reply Brief at 12-13; U.S. Brief at 24 n.9), federally mandated FLSA wages constitute a property interest created by federal law, and thus the State's refusal to afford a federally mandated remedy (or indeed any adequate remedy) for the recovery of those wages, constitutes a deprivation of property without due process. Indeed, the federally mandated remedy may properly be viewed as an exercise of the power delegated to Congress under the Fourteenth Amendment to ensure that the States provide the redress needed to protect such property interests.

initiated, in state tribunals. The conflicting positions taken by the Arkansas Supreme Court in the *Jacoby* case and the Maine Supreme Judicial Court in this case are representative of the resulting division in the state courts.

(a) In the *Jacoby* case, as here, Arkansas employees, after non-suiting their federal court case in the wake of *Seminole Tribe*, filed a state court suit alleging non-payment by the State of overtime wages owing under the FLSA. As here, the Arkansas Department of Education argued that the employees' FLSA claims were barred by the Eleventh Amendment and/or the State's own law of sovereign immunity.

The Arkansas Supreme Court, in a unanimous decision, rejected that argument. The Arkansas Court noted: "In *Hilton* [*v. South Carolina Public Railways Comm'n*, 502 U.S. 17 (1991)], the Court made the point emphatically that the Eleventh Amendment does not apply to state courts. *Hilton*, 502 U.S. at 204-05, citing *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989); *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Nevada v. Hall*, 440 U.S. 410 (1979)." *Jacoby*, 962 S.W.2d at 775. And, the Arkansas Court added that where, as in *Hilton*, the federal statute "did impose liability on the states the [Supreme] Court concluded that the Supremacy Clause made that law fully enforceable against the states in state courts." 962 S.W.2d at 776. That logic applied equally to sustain the state employees' FLSA claims. *Id.*

The Arkansas Court relied upon *Howlett v. Rose*, 496 U.S. 356 (1990), cited in *Hilton*, to support the proposition that the States "may not exempt" themselves "from federal liability by relying on their own common-law heritage." *Jacoby*, 962 S.W.2d at 776, quoting *Howlett*, 496 U.S. at 383. For the same reason, the Arkansas Court held that the Arkansas employees' FLSA claims remained enforceable in state court regardless of any immunity provisions in the Arkansas Constitution. *Jacoby*, 962 S.W.2d at 777.[7]

Finally, the Arkansas Court recognized "that some ambiguous language in the *Seminole Tribe* opinion concerning 'unconsenting states' has been seized upon as support for the proposition that state consent is a prerequisite to state liability in its own courts for violation of a federal right." *Jacoby*, 962 S.W.2d at 778 citing Carlos Manual Vazquez, *What is Eleventh Amendment Immunity?* 106 Yale L. J. 1683, 1717 (1997), citing *Seminole Tribe*, 517 U.S. at 72. But the Arkansas Court discounted these ambiguities—and similar *dictum* in *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994), and *Hans v. Louisiana*, 134 U.S. 1 (1890)—as "inconsequential" in light of *Hilton* and *Howlett*. *Jacoby*, 962 S.W.2d at 778.

The Arkansas Court thus concluded that "[i]n sum, we have no doubt that the weight of authority favors the employees in this matter. The FLSA now remains to be enforced against state employers only in state courts and is viable only by virtue of the Supremacy Clause." *Jacoby*, 962 S.W.2d at 778.

(b) In sharp contrast, in the instant case, the Maine Supreme Judicial Court read this Court's Eleventh Amendment decisions including *Seminole Tribe*, to authorize the precise state sovereign immunity bar rejected by the Arkansas Court. That conclusion flowed, in the Maine Court majority's view, from "the underlying premise of the Eleventh Amendment" which "reflects but one aspect of the states' inherent, more sweeping immunity from suits brought by private parties. A power so

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[7] In so holding, the Arkansas Court distinguished state court decisions from other jurisdictions, *e.g. Mossman v. Donahey*, 346 N.E.2d 305 (Ohio 1976); *Morris v. Massachusetts Maritime Academy*, 565 N.E.2d 422 (Mass. 1991), which had upheld state sovereign immunity to federal claims, on the ground that those decisions predated *Hilton*, "with its citation to *Howlett v. Rose, supra*." *Jacoby*, 962 S.W.2d at 778.

basic and profound would be an odd power indeed if it protected the states from suit in the federal courts but provided no comparable protection in their own courts." Pet. App. 6a.

The Maine Court majority found that *Seminole Tribe* "reinforces this position," Pet. App. 4a, and put aside *Hilton*, on which the Arkansas Court so heavily relied, by noting that:

> [T]he [*Seminole Tribe*] Court spoke of the Amendment as reflecting a more fundamental principle of state sovereign immunity . . . The Court stated: "[b]ehind the words of the constitutional provisions . . . [t]here is . . . the postulate that States of the Union, still possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention." [*Seminole Tribe*, 517 U.S.] at 68 (*quoting Principality of Monaco v. Mississippi*, 292 U.S. 313, 323 (1934) (internal quotation and citation omitted). [Pet. App. 5a-6a.]

The Maine Court dissenters, however, read *Seminole Tribe*, much as did the Arkansas Court, to limit only Article III jurisdiction, and not Congress' Article I powers: *Seminole Tribe*, they said "provides little guidance as to the proper resolution of this case: state courts are not Article III courts, and 'the Eleventh Amendment does not apply in state courts.'" Pet. App. 9a, quoting *Hilton*, 502 U.S. at 205. The dissenters added that the Maine Court majority decision "accords symmetry [between federal and state court immunities] undue weight, is devoid of any analysis of the FLSA, and does not address the Supremacy Clause." Pet. App. 10a. "To the extent that Maine's common law doctrine of sovereign immunity conflicts with the provisions of the FLSA which subject the State to liability in state court, the Supremacy Clause resolves that conflict in favor of the FLSA." *Id.* at 12a.

(c) The lower state court decisions in other jurisdictions cited pp. 7-8, *supra*, divide along essentially the same fault line reflecting the same sharp disagreement over the *Seminole Tribe* decision's significance.

Finding State sovereign immunity not to bar FLSA private claims: *Whittington v. State of New Mexico Dept of Public Safety*, Docket No. 19,065 (N.M. Ct. App., September 3, 1998) ("based on the previous decisions by the Supreme Court, we find that the Supremacy Clause requires the district court to enforce the FLSA notwithstanding the Department's assertion of state sovereign immunity"); *Ahern et al. v. State of New York*, No. 80430, 1998 WL 38623 at *2, July 9, 1998) (holding that *Seminole Tribe* and Eleventh Amendment treat with state immunity in federal fora and "not with the states' immunity from suit in any forum") (citations omitted); *Bunch v. Robinson*, 122 Md. App. 437, 712 A.2d 585, 595) (Md. Ct. Spec. App., 1998) petition for certiorari to Maryland Court of Appeals pending (holding that "*Seminole Tribe* neither overruled *Garcia* [*v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1885)], nor repudiated the prior law from *Hilton* regarding the inapplicability of the Eleventh Amendment to state court actions"); *Raper v. State of Iowa*, No. CL 678918 (District Court for Polk County, October 23, 1997) (rejecting State's argument that "collapsed the doctrine of sovereign immunity and the Eleventh Amendment so that no real difference exists between the two.").[8]

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[8] The lower federal courts have joined in the debate, albeit in *dictum*, by expressing the view that the FLSA claims those courts were dismissing on Eleventh Amendment grounds could still be prosecuted in state courts. *See, Aaron v. Kansas*, 115 F.3d 813, 817 (10th Cir. 1997) ("[E]mployees can sue in state court for money damages under the FLSA as a state court of general jurisdiction is obligated by the Supremacy Clause to enforce federal law."); *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (1996), *amended on petition for rehearing*, 107 F.3d 358 (6th Cir. 1996) (same).

Finding State sovereign immunity to bar private FLSA actions: *Allen v. Fauver*, No. ESX-L-3302-94 (N.J. Super. Ct., February 17, 1998) on appeal to N.J. Super Ct. Law Div. No. A-3795-9775 ("This Court agrees with the rationale of applying Eleventh Amendment principles to state common law immunity"); *German v. Wisconsin Dep't of Transportation*, No. 96-CV-1261 (Wis. Circuit Court, March 8, 1997); ("It would be anomalous if the 'states rights' justices who authored *Seminole Tribe* . . . acted to uphold states' Eleventh Amendment immunity from suit but, at the same time, affirmed congressional authority to overcome a state's own sovereign immunity under its state constitution."); cf. *Keller v. Dailey*, No. 97A-PEOS-658 1997 WL 781897 (Ohio App. 10 Dist. December 16, 1997).

* * * *

These jurisdictional papers are neither the time nor the place to plumb the depths of the Eleventh Amendment, the "presupposition" of state sovereign immunity that the Court has stated informs the Amendment, the force of the federal laws enacted pursuant to Congress' enumerated Article I powers by reason of the Supremacy Clause, or the dual function of the state courts in the enforcement of the federal law under the "Madisonian compromise" on the creation of the lower federal courts. For present purposes we rest on the proposition that the conflict below plainly requires plenary consideration and review by this Court. We add only, that, in our view, the Arkansas Supreme Court's decision is clearly correct in that it is strongly supported both by many of this Court's decisions and by the demands of the viable federalism envisioned by the plan of the Constitution.

II.

Whatever else may be true, the concept of a state sovereign immunity bar to a federal statutory private party cause of action in state court must rest on the core premise

that the State interposing the bar has such an immunity to interpose as a matter of positive law. If not—if the State has no such immunity to analogous state statutory private party actions—state court recognition of an immunity to federal actions is not an expression of the State's principled definition of its sovereignty but rather of the proposition, repeatedly *rejected* by this Court, that the state courts may "den[y] jurisdiction . . . based solely upon the source of the law sought to be enforced . . . [and] cast out [the plaintiff] because he is suing to enforce a federal act." *McKnett v. St. Louis & S.F. Railway Co.*, 292 U.S. 230, 233-34 (1934).

The Maine Supreme Judicial Court sanctioned just such a discrimination against the enforcement of federal claims in the Maine courts. In so doing the Maine Court erred and did so in a most fundamental respect.

The Maine Constitution and the Maine common law do *not* place any limit on the Maine legislature's power to subject the State to private party actions in the Maine courts seeking monetary remedies under state statutory law. As we have noted, p. 4 n.3 *supra*, the Maine legislature has in fact exercised its authority to enact a host of state laws which authorize state employees to bring suit against the State for damages, including wages owed. And, the Maine courts have uniformly entertained these state statutory actions. What the Maine courts will *not* do is entertain analogous federal statutory private party actions—these are met with a selective state sovereign immunity bar applicable only to such federal actions.

That, we submit, is contrary to the Supremacy Clause, which charges "state courts with a coordinate responsibility to enforce [federal] law according to their regular modes of procedure." *Howlett v. Rose*, 496 U.S. at 367. As the *Howlett* Court added, "[t]he laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are . . . . The two together form one system of juris-

prudence, which constitutes the law of the land for the State." 496 U.S. at 367, quoting *Claflin v. Houseman*, 93 U.S. 130, 136-137 (1876). For that reason, federal laws, such as the FLSA, passed by Congress acting within the scope of its Article I enumerated powers are as much a part of the law of Maine as laws passed by the Maine legislature.

In this regard, then, it is "settled that a state may not exercise its judicial power in a manner that discriminates between analogous federal and state causes of actions." *F.E.R.C. v. Mississippi*, 456 U.S. 742, 776 n.1 (1982) (O'Connor, J., concurring and dissenting). States must make their courts equally "available for the vindication of federal as well as state created rights." *Id.* at 769. By opening and closing its courts through its selective state sovereign immunity bar, Maine practices just such an improper discrimination against federal causes of action analogous to state causes of actions.

The principle that states may not selectively favor state causes of action—or selectively disfavor federal causes of action—in state courts is, indeed, one of long standing. As the Court recognized in *Mondou v. New York*, 223 U.S. 1, 58 (191) (the *Second Employers' Liability Case*), the States must hear claims in their courts brought under the Federal Employees Liability Act ("FELA") when "their jurisdiction, as prescribed by local laws, is adequate to the occasion." The principle set forth in *Mondou* has been repeatedly reaffirmed. *See, e.g., Minneapolis & St. L.R. Co. v. Bombolis*, 241 U.S. 211 (1916); *McKnett v. St. Louis & S.F. Railway Co., supra; Testa v. Katt*, 330 U.S. 386 (1947). *See also F.E.R.C. v. Mississippi*, 456 U.S. at 760; *Martinez v. California*, 444 U.S. 277, 283, n.7 (1980). As the *Bombolis* Court put the matter:

> [T]he principle upon which the [*Second Employer's Liability Case*] rested, while not questioning the diverse governmental sources from which state and national courts drew their authority, recognized the unity of the governments, national and state, and the common fealty of all courts, both state and national, to both state and national Constitutions, and the duty resting upon them, when it was within the scope of their authority, to protect and enforce rights lawfully created, without reference to the particular government from whose exercise of lawful power the right arose. [241 U.S. at 222-223.]

To be sure, the Maine Court rejected the parole officers' argument, grounded in this firmly established principle that state courts may not discriminate against federal claims, on the basis that no Maine law provides a claim for overtime *precisely* like the parole officers' federal claim. Pet. App. 7a. But, as the foregoing discussion demonstrates, this Court's decisions make plain that a state court is obligated to entertain federal claims where that state court entertains state claims of the "*same type*," even if those claims are not identical to the federal claims. *Testa v. Katt*, 330 U.S. at 394, emphasis added. And, the Maine courts, as noted above, entertain a wide variety of state employee state statutory law claims against the State for monetary relief. *Supra*, p. 4 n.3.

Thus, even if there are circumstances in which a state court may refuse to entertain a federal statutory cause of action such as the present one on sovereign immunity grounds—and we agree with the Arkansas Supreme Court that there are not—the decision below cannot stand in view of the Maine Court's recognition that there is no state sovereign immunity bar to analogous state statutory law private party actions.

CONCLUSION

For the above stated reasons this petition for a writ of certiorari to the Maine Supreme Judicial Court should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

SUPREME JUDICIAL COURT OF MAINE

Cum-97-446

JOHN H. ALDEN *et al.*

v.

STATE OF MAINE

August 4, 1998, Decided

WATHEN, C.J., and ROBERTS, CLIFFORD, RUDMAN, DANA, and SAUFLEY, JJ. Majority: WATHEN, C.J., and ROBERTS, CLIFFORD, and SAUFLEY, JJ. Dissenting: RUDMAN and DANA, JJ.

OPINION

ROBERTS, J.

John H. Alden [1] appeals from the judgment of the Superior Court (Cumberland County, Calkins, J.) dismissing on the basis of sovereign immunity his complaint brought pursuant to the federal Fair Labor Standards Act. Alden contends that the doctrine of sovereign immunity may not be interposed to defend against this federally created cause of action. We affirm the judgment.

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[1] Alden is joined by 66 additional plaintiffs, all present or former state probation officers. For clarity, and because the central issue on appeal is identical for all plaintiffs, we refer only to Alden.

In December 1992 Alden, a state probation officer, filed a complaint against the State in federal district court seeking overtime pay pursuant to the Fair Labor Standards Act (FLSA). While that claim was pending, the Supreme Court of the United States decided *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), which held, on the basis of the Eleventh Amendment to the United States Constitution, that Congress may not authorize pursuant to its Article I powers suits in federal court by private parties against unconsenting states. 517 U.S. at 72-73. Relying on Seminole Tribe, the federal district court dismissed Alden's claim for lack of subject matter jurisdiction. *Mills v. State*, 1996 U.S. Dist. LEXIS 9985, 1996 WL 400510 (D. Me. July 3, 1996), aff'd, 118 F.3d 37 (1st Cir. 1997).

Alden then filed essentially the same complaint in the Superior Court in August 1996. The State moved for a judgment on the pleadings pursuant to M.R. Civ. P. 12(c), stating as grounds the doctrine of state sovereign immunity and the statute of limitations. Although the court found that Alden's claim was not barred by the statute of limitations, it granted the State's motion on the ground of sovereign immunity. Alden's appeal followed.

The principal issue before us is whether state sovereign immunity, as reflected in the Eleventh Amendment, protects the State from this federally created cause of action in its own courts. Alden contends that Congress has abrogated the State's sovereign immunity by enacting the FLSA. We disagree. Although Congress may have intended to subject the states to the overtime provisions of the FLSA, it does not have the necessary power, pursuant to the Constitution, to accomplish this end.

The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of

another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. AMEND. XI. "Although the text of the Amendment would appear to restrict only the Article III diversity jurisdiction of the federal courts, we have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms." *Seminole Tribe*, 517 U.S. at 54 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 115 L. Ed. 2d 686, 111 S. Ct. 2578 (1991)). That presupposition consists of two elements: "that each State is a sovereign entity in our federal system . . . and . . . that 'it is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.'" Id. (quoting The Federalist No. 81, at 487 (Alexander Hamilton) (Clinton Rositer ed. (1961)) (citations omitted).

We have concluded on several occasions that sovereign immunity does protect the State from suit by private parties in its own courts without its consent, even when the cause of action derives from federal law. In *Drake v. Smith*, 390 A.2d 541 (Me. 1978), we considered the question whether the State's enactment of a statutory scheme whereby it became a partner with the federal government in paying medical care costs of certain recipients of federal aid constituted a waiver of state sovereign immunity. We held that because the State had not waived its Eleventh Amendment immunity from suit in federal court, it was not reasonable to conclude that it had waived its sovereign immunity to the same suit in state court. *Id.* at 546.

In *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), aff'd on other grounds, 448 U.S. 1, 65 L. Ed. 2d 555, 100 S. Ct. 2502 (1980), we addressed the amenability of the State to suits by private parties for retroactive AFDC benefits pursuant to 42 U.S.C. § 1983. We held that "in the absence of waiver by the state of its sovereign immunity, the state may constitutionally interpose that immunity as a bar to a class action brought in a state court under . . .

§ 1983." 405 A.2d at 237. Similarly, in *Jackson v. State*, 544 A.2d 291 (Me. 1988) cert. denied, 491 U.S. 904, 105 L. Ed. 2d 694, 109 S. Ct. 3185 (1989), addressing the State's amenability to suit under the federal Rehabilitation Act, 29 U.S.C. § 794, we held that "the State may constitutionally interpose its sovereign immunity in state court as a bar to an award of damages under the Rehabilitation Act." *Id.* at 298. Most recently, *Moody v. Commissioner, Dept. of Human Servs.*, 661 A.2d 156 (Me. 1995), concerned the AFDC program and a violation by the Department of Human Services of the due process rights of the plaintiffs. In reaching the conclusion that the State is protected by sovereign immunity from suit in its own courts, we stated: "The Eleventh Amendment to the United States Constitution precludes the federal courts from circumventing the sovereign immunity of the states. Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly protects the states from actions [in] state courts." *Id.* at 158 n.3 (citation omitted).

Reading these decisions in combination, it is clear that we have looked to the Eleventh Amendment to define the contours of state sovereign immunity. If Congress cannot force the states to defend in federal court against claims by private individuals, it similarly cannot force the states to defend in their own courts against these same claims. In reaching this conclusion, we have found that the Eleventh Amendment and state sovereign immunity are analogous, to the extent that both protect the State from being forced by an act of Congress to defend against a federal cause of action brought by a private individual. To hold otherwise, by concluding that a state, immune from suit in federal court, must defend against that same suit in its own courts, would effectively vitiate the Eleventh Amendment.

The Supreme Court's opinion in Seminole Tribe reinforces this position. The Court began its analysis with the general proposition that in order to abrogate a state's

sovereign immunity Congress must have " 'unequivocally expressed its intent to abrogate the immunity,' " and must have done so " 'pursuant to a valid exercise of power.' " *Seminole Tribe*, 517 U.S. at 55 (quoting *Green v. Mansour*, 474 U.S. 64, 68, 88 L. Ed. 2d 371, 106 S. Ct. 423 (1985)). Addressing the first element, the Court concluded that it is "indubitable that Congress intended through the [FLSA] to abrogate the States' sovereign immunity from suit." 517 U.S. at 57.

The Court then addressed the second element, namely, whether Congress has the power to abrogate sovereign immunity in this manner. Concluding that the Eleventh Amendment deprives Congress of this power, the Court stated that the Amendment "serves to avoid 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.' " *Id.* at 58 (quoting *Puerto Rico Aqueduct & Sewer Auth v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993)). To suggest, as Alden has done, that this indignity would be lessened by simply dragging the State into a different forum misconstrues the underlying premise of the Eleventh Amendment.

The Eleventh Amendment does not explicitly protect the states from suit in their own courts. *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197, 204-05, 116 L. Ed. 2d 560, 112 S. Ct. 560 (1991). That does not, however, end the inquiry. In reaching its conclusion in Seminole Tribe, the Court spoke of the Amendment as reflecting a more fundamental principle of state sovereign immunity: "For over a century, we have grounded our decisions in the oftrepeated understanding of state sovereign immunity as an essential part of the Eleventh Amendment." *Seminole Tribe*, 517 U.S. at 66. The Court stated:

> Behind the words of the constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still

> possessing attributes of sovereignty, shall be immune from suits, without their consent, save where there has been a surrender of this immunity in the plan of the convention.

Id. at 68 (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 323, 78 L. Ed. 1282, 54 S. Ct. 745 (1934) (internal quotation and citation omitted)). The postulate at work here, state sovereign immunity, is a "background principle" that is "embodied in the Eleventh Amendment." 517 U.S. at 72. Thus the Eleventh Amendment does not delimit the scope and effect of state sovereign immunity. Rather, it reflects but one aspect of the states' inherent, more sweeping immunity from suits brought by private parties. A power so basic and profound would be an odd power indeed if it protected the states from suit in the federal courts but provided no comparable protection in their own courts. If Congress does not have the power to abrogate state sovereign immunity with respect to federal causes of action brought in federal courts, as the Seminole Tribe case clearly held, then that limitation on congressional power may not be circumvented simply by moving to a state court. Accordingly, we conclude that sovereign immunity protects the State from defending this federal cause of action in its own courts.

Alden contends, in the alternative, that the State has waived its sovereign immunity by implication, having enacted several statutes whereby the State has made itself amenable to suit in the area of state employee wage claims. Conspicuously absent from Alden's list of statutes affecting the wages and employment rights of state employees is 26 M.R.S.A. § 664(3) (Supp. 1997), which is the only statutory provision directly relevant to the central issue on appeal—the State's amenability to suit by state employees for overtime pay. That section provides, "The overtime provision of this section does not apply to public employees," *id.*, who are defined as "any

person[s] whose wages are paid by . . . the State." *Id.* § 663(10) (1988).

We have stated that in the absence of a specific statutory waiver of immunity, "a legislative waiver of the sovereign's immunity from suit may be found implicit in a general scheme plainly contemplating that the State will become party to particular kinds of contracts." *Drake*, 390 A.2d at 545. In the present instance, however, it is impossible to find an implied waiver in a larger statutory scheme when the Legislature has spoken explicitly on the point. Any implications of these statutory provisions are limited by the Legislature's unambiguous statement that the State is not subject to the overtime requirement.

The entry is:

Judgment affirmed.

DANA, J., with whom RUDMAN, J., joins, dissenting.

I must respectfully dissent. Contrary to the Court's conclusion, the Eleventh Amendment does not define the scope of state sovereign immunity. Although the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), precludes Alden from prosecuting this action in federal court, neither Seminole Tribe nor the Supremacy Clause permits the State to interpose its sovereign immunity as a defense to a suit alleging a violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219 (1965, 1978 & Supp. 1998), that is maintained in state court.

Pursuant to the FLSA, an employee may bring an action alleging violations of, inter alia, the minimum wage and maximum hours provisions of the act, "against any employer (including a public agency) in any Federal or State court of competent jurisdiction . . . ." *Id.* § 216(b) (Supp. 1998). This provision clearly expresses a congressional intent to abrogate the states' immunity from

suit. The Court concludes that Congress lacks the authority to abrogate the states' immunity from FLSA actions prosecuted in state courts by relying on Seminole Tribe, a reliance that is misplaced.

In Seminole Tribe, the Supreme Court determined that the Indian Commerce Clause does not grant Congress the authority to abrogate the states' Eleventh Amendment immunity. See 517 U.S. at 47. Prior to the Seminole Tribe decision, the Supreme Court had found only two constitutional provisions that provided Congress with the authority to abrogate Eleventh Amendment immunity: the Fourteenth Amendment, see *Fitzpatrick v. Bitzer*, 427 U.S. 445, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976); and the Interstate Commerce Clause, see *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989). See *Seminole Tribe*, 517 U.S. at 59. The Court agreed with the Seminole Tribe's contention that " 'there is no principled basis for finding that congressional power under the Indian Commerce Clause is less than that conferred by the Interstate Commerce Clause,' " *id.* at 60-62, but it overruled the holding of Union Gas that the Interstate Commerce Clause grants Congress the power to abrogate Eleventh Amendment immunity, see *id.* at 66. The Court reasoned that the holding of Union Gas "deviated sharply" from the well-established constitutional principle that the Eleventh Amendment "limited the federal courts' jurisdiction under Article III," and it rejected the conclusion of the Union Gas plurality "that Congress could under Article I expand the scope of the federal courts' jurisdiction under Article III." *Id.* at 63. The Court emphasized that "Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Id.* at 73.

In Seminole Tribe, therefore, the Court determined that Congress had exceeded its Article I powers by seeking to expand the jurisdiction of Article III courts beyond the limits imposed by the Eleventh Amendment. That decision provides little guidance as to the proper resolution of this case: state courts are not Article III courts, and "the Eleventh Amendment does not apply in state courts," *Hilton v. South Carolina Pub. Ry. Comm'n*, 502 U.S. 197, 205, 116 L. Ed. 2d 560, 112 S. Ct. 560 (1991). See also *Bunch v. Robinson*, 712 A.2d 585, 1998 Md. App. LEXIS 134, *30-31, 1998 WL 348429, at *11 (Md. Ct. Spec. App. 1998) ("The Eleventh Amendment addresses the susceptibility of a state to suit in federal court, not the general immunity of a state from private suit"). In contrast, the analytical framework set forth in *Hilton v. South Carolina Public Railways Commission*, 502 U.S. 197, 116 L. Ed. 2d 560, 112 S. Ct. 560 (1991), sheds considerable light on our inquiry.

In Hilton, the Court considered whether the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51-60 (1986), permits a cause of action against state-owned railroads in state courts. See 502 U.S. at 199. The Court had held in 1964 that FELA authorizes damages suits against state-owned railroads, and that states waive their Eleventh Amendment immunity by engaging in the railway business. See *Parden v. Terminal Ry. of Alabama Docks Dep't*, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964). The Court reconsidered the Parden holding in 1987, however, and concluded that FELA, as incorporated by the Jones Act, 46 U.S.C. app. § 688 (Supp. 1998), did not abrogate states' Eleventh Amendment immunity. See *Welch v. Texas Dep't of Highways and Pub. Transp.*, 483 U.S. 468, 97 L. Ed. 2d 389, 107 S. Ct. 2941 (1987).

Rejecting a contention that the Welch decision controlled its inquiry, the Court in Hilton concluded that FELA does authorize causes of action against the states in their courts. See *Hilton*, 502 U.S. at 203. The Court reasoned:

> the most vital consideration of our decision today, which is that to confer immunity from state-court

> suit would strip all FELA and Jones Act protection from workers employed by the States, was not addressed or at all discussed in the Welch decision. Indeed, that omission can best be explained by the assumption . . . that the Jones Act (and so too FELA) by its terms extends to the States. This coverage, and the jurisdiction of state courts to entertain a suit free from Eleventh Amendment constraints, is a plausible explanation for the absence in Welch of any discussion of the practical adverse effects of overruling that portion of Parden which pertained only to the Eleventh Amendment, since continued state-court jurisdiction made those effects minimal.

Id. at 203-04 (footnote omitted) (emphasis added). The Court observed that the issue in Hilton "is different from the issue in our Eleventh Amendment cases in a fundamental respect: The latter cases involve the application of a rule of constitutional law, while the former case[] applies an ordinary rule of statutory construction." *Id.* at 205 (quotation omitted) (emphasis added). Although the Court's construction of FELA relied heavily upon Parden and stare decisis, it observed that the "primary focus" of a statutory construction should be "the language and history" of the statute. *Id.* at 205. The Court cautioned that although the scope of Eleventh Amendment immunity is "a relevant consideration," achieving symmetry between a state's liability in state and federal courts should not be imperative. *Id.* at 205-06. The Hilton decision concluded that because FELA imposes liability upon the states, "the Supremacy Clause makes that statute the law in every State, fully enforceable in state court." *Id.* at 207.

The Court's decision in this case accords symmetry undue weight, is devoid of any analysis of the FLSA, and does not address the Supremacy Clause. A different, and in my opinion better, approach is illustrated by the recent decision of the Arkansas Supreme Court in *Jacoby v. Arkansas Department of Education*, 331 Ark. 508, 962

S.W.2d 773 (1998). In Jacoby, the court concluded that neither the Eleventh Amendment nor the sovereign immunity provision of the Arkansas Constitution [2] prevents state employees from maintaining an FLSA cause of action against the state in state court. See 962 S.W.2d at 775-78; see also *Ribitzki v. School Bd. of Highlands County*, 710 So. 2d 226 (Fla. Dist. Ct. App. 1998) (holding that the Eleventh Amendment does not immunize the state from an FLSA action in state court); *Bunch*, 712 A.2d 585, 1998 WL 348429 (holding that the Supremacy Clause requires state courts to enforce the FLSA against the states and that the scope of states' sovereign immunity from suit in their own courts is not coterminous with their Eleventh Amendment immunity). The Jacoby court determined that the Seminole Tribe decision was not conclusive "of state liability in its own courts." 962 S.W.2d at 777. The court reasoned that pursuant to the Supremacy Clause, the FLSA must be treated as much the law of Arkansas as laws passed by the Arkansas legislature. See id. at 775. The court observed that "state employees . . . are clearly entitled to file FLSA claims against state agencies as employers"; that "the FLSA expressly provides that state courts have jurisdiction over these claims"; and that the FLSA is "the law throughout the land, and state sovereign immunity cannot impede it." *Id.* at 777.

The Supreme Court has decided that Congress acted within its Article I powers and did not violate the Tenth Amendment when it provided state employees with the protections afforded by the FLSA. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 555-56, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985), reh'g denied, 471 U.S. 1049, 85 L. Ed. 2d 340, 105 S. Ct. 2041

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[2] Pursuant to Article 5, section 20 of the Arkansas Constitution, "the State of Arkansas shall never be made a defendant in any of her courts."

(1985).[3] Pursuant to the Supremacy Clause, "this Constitution, and the Laws of the United States which shall be made in Pursuance thereof. . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. Const. art. 6. As the Supreme Court explained in Howlett v. Rose.

> federal law is enforceable in state courts . . . because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws 'the supreme Law of the Land,' and charges state courts with a coordinate responsibility to enforce that law according to their regular mode of procedure.

496 U.S. 356, 367, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990). "When Congress acts within its enumerated powers to create a federal cause of action that imposes liability on the states, state courts of general jurisdiction may not refuse to hear the federal claim." *Bunch*, 712 A.2d 585, 1998 Md. App. LEXIS 134 at *13, 1998 WL 348429, at *5. To the extent that Maine's common law doctrine of sovereign immunity conflicts with the provisions of the FLSA which subject the State to liability in state court, the Supremacy Clause resolves that conflict in favor of the FLSA. Cf. *Howlett*, 496 U.S. at 377-78 (rejecting interpretation of Florida's sovereign immunity statute that rendered all state subdivisions immune from section 1983 actions maintained in Florida courts and

[3] In Garcia, the Court observed that federal supervision over "the judicial action of the States is . . . permissible . . . as to matters by the Constitution specifically authorized or delegated to the United States." 469 U.S. at 549 (quotation and citation omitted). The Court reasoned: "we perceive nothing in the overtime and minimum-wage requirements of the FLSA . . . that is destructive of state sovereignty or violative of any constitutional provision." *Id.* at 554.

concluding, "to the extent that the Florida law of sovereign immunity reflects a substantive disagreement with the extent to which governmental entities should be held liable for their constitutional violations, that disagreement cannot override the dictates of federal law.").

A determination that the Supremacy Clause requires states to defend FLSA causes of action that are prosecuted in state courts, contrary to the Court's concern, would not "vitiate the Eleventh Amendment." Such a determination would not strip the State of its sovereign immunity whenever a litigant sought to prosecute a federally-created cause of action against it. The FLSA's express authorization of suits against state employers in state courts constitutes an explicit statement of congressional intent to abrogate the states' immunity from suit in their own courts. If a statute creating a federal cause of action does not contain an express statement of congressional intent to abrogate states' immunity, then a state could successfully interpose its sovereign immunity as a defense to that cause of action.[4] See *Hilton*, 502 U.S. at 206 ("When the issue to be resolved is one of statutory construction, of congressional intent to impose monetary liability on the States, the requirement of a clear statement by Congress to impose such liability creates a rule that ought to be of assistance to the Congress and the courts in drafting and interpreting legislation.").

I would vacate the judgment of the Superior Court.

[4] Similarly, the Maine Legislature may waive the State's sovereign immunity only by enacting "a general law plainly conferring the State's consent to be sued as to a class of cases," or by dealing "specifically with a particular action sought to be brought against the State and giving its plainly stated consent that the State be sued in that action." *Drake v. Smith*, 390 A.2d 541, 544 (Me. 1978). Thus, the ability of Congress, when enacting valid legislation, to abrogate the State of Maine's immunity from suit in its own courts parallels the Maine Legislature's ability to waive the State's sovereign immunity.

APPENDIX B

STATE OF MAINE
CUMBERLAND, SS:

SUPERIOR COURT

Civil Action Docket No. CV-96-751

JOHN H. ALDEN, *et al.*,
Plaintiffs

v.

STATE OF MAINE,
Defendant

DECISION AND ORDER

The named plaintiffs in this case number approximately 65. They are all employed by the Defendant State of Maine as probation officers and juvenile caseworkers. In this action they allege that Maine owes them money for overtime work for which they should have been paid pursuant to the Fair Labor Standards Act (FLSA). 29 U.S.C. §§ 201 *et seq.*

An identical lawsuit was filed by many of these same plaintiffs in federal court on December 21, 1992. The federal court held that the provisions of FLSA prohibited Maine from excluding the plaintiffs from coverage of FLSA. *Mills v. State of Maine*, 839 F. Supp. 3, 4 (D. Me. 1993). It later held that liquidated damages and back pay for a two year period would be awarded to the plaintiffs. *Mills v. State of Maine*, 853 F. Supp. 551, 555, 556 (D.Me. 1994). The matter was referred to a special master for a determination on the amount of back pay owed to each plaintiff. Both parties filed objections to

the master's report. Before a final judgment could be entered by the court, the case of *Seminole Tribe of Florida v. Florida*, 116 S.Ct. 1114 (1996) was decided. Relying upon the holding in *Seminole*, the federal court determined that it lacked subject matter jurisdiction because Maine had not waived its Eleventh Amendment Rights.[1] The court dismissed the complaint, and the First Circuit affirmed the dismissal. *Mills v. State of Maine*, No. 92-410-P-H, 1996 WL 400410 (D. Me. July 3, 1996), aff'd —— F.3d ——, No. 96-1973, 1997 WL 361186 (1st Cir. July 7, 1997). The First Circuit held that, although Congress expressly intended to abrogate state immunity in FLSA actions in federal court, Congress did not have the power to do so under the Commerce Clause, the source of Congress' power to enact FLSA. The court further held that FLSA was not enacted pursuant to section 5 of the Fourteenth Amendment, which is a source of power by which Congress can abrogate sovereign immunity.

While the *Mills* case was pending, pursuant to a collective bargaining agreement, Maine began paying the probation officers and juvenile caseworkers for overtime, as of February 6, 1994.

On July 31, 1996, the plaintiffs filed the instant action. Maine's answer sets forth the affirmative defenses of sovereign immunity and statute of limitations, among others. Plaintiffs brought a motion to dismiss these two defenses,

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1 *Seminole* involved the Indian Gaming Regulatory Act which required states to negotiate with tribes and authorized suit against the state to compel performances of the state's duty under the Act. The Supreme Court held that "notwithstanding Congress' clear intent to abrogate the States' sovereign immunity, the Indian Commerce Clause does not grant Congress that power . . . ." *Seminole*, 116 S. Ct. at 1119. The Court expressly overturned *Pennsylvania v. Union Gas Co.* 491 U.S. 1 (1989) which had held that the Commerce Clause gave Congress the power to abrogate States' immunity under the Eleventh Amendment.

and Maine moved for judgment on the pleadings pursuant to Rule 12(c).

I. Statute of limitations

The statute of limitations for violations of FLSA is two years, unless the violation is willful, in which case the period of limitations is three years. 29 U.S.C. § 255. In the federal court action, the plaintiffs sought FLSA remedies for three years prior to the filing of the action which was on December 21, 1992. It is not disputed that Maine has paid overtime to the plaintiffs since February 6, 1994. In this action the plaintiffs are seeking damages for the period of December 21, 1989 to February 6, 1994.

Maine argues that the two year period of limitations is applicable and that since this action was not filed until July 31, 1996, which was more than two years after Maine started paying overtime to the plaintiffs, the action must be dismissed. Maine points out that the federal court held that the two year period applied instead of the three year period because the violation was not willful. *Mills*, 853 F. Supp. at 555. The plaintiffs claim that the statute of limitations was tolled during the pendency of their federal action. Both parties acknowledge that federal law on limitations applies in this case because it is a federal statute of limitations that is at issue.

The Supreme Court held that the doctrine of equitable tolling is available in federal cases. *Burnett v. New York Central R.R. Co.*, 380 U.S. 424, 434-35 (1965). In *Burnett* the plaintiff filed a claim under the Federal Employers' Liability Act (FELA) in state court, but the action was dismissed for improper venue. A few days later the plaintiff filed the same action in federal court, but it was dismissed because the statute of limitations had run. Because the state action had been brought in a timely fashion and because the defendant was not unfairly surprised by the filing of the federal action, equitable

tolling was appropriate. The Court held that equitable tolling furthered the policies and remedial purposes of FELA.

Many other federal cases have relied on *Burnett* and applied equitable tolling to a variety of federal limitations statutes including cases in which the defendant is a governmental entity.[2] *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The courts look at whether the doctrine of equitable tolling will effectuate the purpose of the statutory scheme; whether the plaintiff has been diligent; and whether the defendant will be surprised by the revival of a stale claim.[3] Another factor utilized by the courts in deciding whether to allow equitable tolling is that the first action be filed in a court with apparent jurisdiction.[4]

Relating these factors to the instant case, it is apparent that the doctrine of equitable tolling should be applied. It can hardly be said that equitable tolling would not further the policies and purposes of FLSA which are set forth in 29 U.S.C. § 202. It is a remedial statute designed to correct and eliminate working conditions that are detrimental to the health and well-being of workers. An integral portion of the scheme is the right to collect wages that have been wrongfully withheld. Allowing the plaintiffs to finish in state court what they started to do in federal court furthers the policies of FLSA. Maine cannot claim unfair surprise nor complain about the staleness of the claims. Both parties had been working

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[2] For a list of such cases see *Webb v. United States*, 66 F.3d 691, 696 (4th Cir. 1995).

[3] Where the plaintiff has been diligent and the defendant has been given notice of the claim, equitable tolling is appropriate. *Farrell v. Automobile Club of Michigan*, 870 F.2d 1129, 1134 (6th Cir. 1989) (allowed equitable tolling when ERISA claim brought in state court).

[4] Filing an action in a court that clearly lacks jurisdiction will not toll the statute of limitations. *Farrell*, 870 F.2d at 1133.

toward a resolution of each individual plaintiff's claim before the *Seminole* decision forced the federal court to stop the proceedings. Since the date of the filing of the federal suit Maine has been on notice that claims for unpaid overtime were being made. The requirement that the first court have apparent jurisdiction has been met in this case; the *Mills* court had jurisdiction until the decision in *Seminole*.

II. Sovereign Immunity

Maine submits that the doctrine of sovereign immunity bars the plaintiffs from obtaining any monetary damages from it. In support of this proposition, Maine relies upon four cases: *Moody v. Commissioner, Dept. of Human Services*, 661 A.2d 156 (Me. 1995); *Jackson v. State*, 544 A.2d 291 (Me. 1988), *cert. denied*, 491 U.S. 904 (1989); *Thiboutot v. State*, 405 A.2d 230 (Me. 1979), *aff'd on other grounds*, 448 U.S. 1 (1980); and *Drake v. Smith*, 390 A.2d 541 (Me. 1978).

Drake involved payments owed to a nursing home by the Maine Department of Human Services under a federal/state welfare program. The trial court ordered the Department to pay the nursing home, but the Law Court held that sovereign immunity required dismissal of the action.[5] The court held that because the Maine Legislature had not waived the Eleventh Amendment immunity of the state to be sued in federal court for violations of the welfare program, it was not reasonable to believe that the Legislature had waived sovereign immunity protection in the state courts. *Drake*, 390 A.2d at 546.

Thiboutot involved benefits under Aid to Families with Dependent Children (AFDC) in which the court determined that the Maine Department of Human Services had violated the federal AFDC statute. The plaintiffs re-

[5] The Law Court declined to determine whether dismissal was required because of a lack of jurisdiction or for the absence of a cause of action. *Drake*, 390 at 543.

quested retroactive relief. The trial court's decision to deny retroactive benefits to members of the plaintiff class was upheld by the Law Court. Relying upon Supreme Court cases which held that the Eleventh Amendment barred recovery of retroactive benefits against a state in federal court, the Law Court held that state sovereign immunity likewise barred the award of retroactive benefits in state court. *Thiboutot*, 405 A.2d at 236-37.

In *Jackson*, the plaintiff sued the State for violation of his rights under the federal Rehabilitation Act. The trial court ordered the State to pay damages. The Law Court reversed the damages award against the State:

> For reasons similar to those expressed in *Thiboutot*, and still without conviction that this federal issue has been finally resolved, we conclude that the State may constitutionally interpose its sovereign immunity in state court as a bar to an award of damages under section 504 of the Rehabilitation Act.

Jackson, 544 A.2d at 298. The Law Court relied upon *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), in which the Supreme Court had held that states were immune from suit in federal court for violations of the Rehabilitation Act.

Moody involved the AFDC program and a violation of the due process rights of the plaintiffs by the Maine Department of Human Services. A similar case was brought in the federal court which found that the Department had violated the plaintiffs' rights under the AFDC statute. The Department stopped the violation and complied with the federal decision. The trial court in the state action ordered the Department to notify members of the plaintiff class of their rights to certain payments, and the Law Court reversed. Since there was no ongoing violation of the law, the only purpose of the notice was to provide a means for the class members to seek retroactive payments. The Law Court held that an award of retroactive monetary

relief was the same as damages to be paid from state funds and was barred by sovereign immunity. In a footnote, the Court stated:

> The Eleventh Amendment to the United States Constitution precludes the federal courts from circumventing the sovereign immunity of the states. Although the Eleventh Amendment is not directly applicable to state courts, the doctrine of sovereign immunity similarly protects the states from actions of state courts.

Id. at 158, n.3. (Citations to *Thiboutot* and *Drake* omitted).

In a concurring opinion in *Moody*, Justice Lipez agreed that prior decisions of the Law Court mandated the result, but he found it "difficult to reconcile with the Supremacy Clause of the Federal Constitution." He agreed that the past decisions of the Law Court had relied upon Eleventh Amendment jurisprudence in the development of the sovereign immunity doctrine in Maine. Because the parties had not challenged that reliance, he found the *Moody* case an inappropriate one to examine whether the Eleventh Amendment principles should continue to be incorporated into the state sovereign immunity doctrine.

These four Maine cases make it apparent that in Maine the doctrine of state sovereign immunity has incorporated the principles of Eleventh Amendment immunity. Simply put, if a plaintiff can't seek damages against the state for violations of a federal law in federal court, the plaintiff can't seek damages in state court either.

Eleventh Amendment jurisprudence is the subject of much debate as can be seen from the vigorous dissents in *Seminole*. The majority accepted the historical view that the understanding of the framers of the United States Constitution was that states were immune as sovereigns. When it became apparent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), that the Supreme Court did not

share that general understanding, the Eleventh Amendment was quickly adopted. *Seminole*, 116 S.Ct. at 1130. For over a century a majority of the Court has recognized that the intent of the Amendment was broader than its literal meaning, and in interpreting the Amendment, the Court has gone beyond the plain meaning of its words. *Hans v. Louisiana*, 134 U.S. 1 (1890). The Amendment, as interpreted, bars all actions for money damages against states in federal court brought by anyone, unless the state has consented to suit. The Court speaks of the Eleventh Amendment as though it were synonymous with common law sovereign immunity. "[E]ach state is a sovereign entity . . . and . . . [i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent." *Seminole*, 116 S.Ct. at 1122 (citations and quotations marks deleted). Although there are other views on the subject of sovereign immunity as demonstrated by the dissents in *Seminole*, it is certainly rational for the Law Court to continue to apply Eleventh Amendment principles to state sovereign immunity.

Maine is not alone in relying upon Eleventh Amendment principles to form and illuminate state sovereign immunity law. Following a thorough discussion of the history of the Eleventh Amendment, the Ohio Supreme Court in *Mossman v. Donahey*, 346 N.E. 2d 305 (Ohio 1976) held that the reasoning and purpose of the Eleventh Amendment applied to suits in state courts as well. "[S]tate sovereign immunity is a right of constitutional proportions, whether it is considered to derive from the plan of the Constitution itself, or from the Eleventh Amendment. . . ." *Mossman*, 346 N.E. 2d at 312. *Accord Morris v. Massachusetts Maritime Academy*, 565 N.E. 2d 422 (Mass. 1991).[6]

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[6] The memorandum of the Secretary of Labor suggests that *Morris* is no longer good law because of the decision of the Supreme Court in *Hilton v. South Carolina Pub. Rys. Comm'n*, 502 U.S. 197

The plaintiffs seek to distinguish the instant case from the four Law Court cases relied upon by Maine. They correctly point out that the Supremacy Clause was not discussed in those four cases. They further argue that if those cases elevate sovereign immunity over the Supremacy Clause, they are wrongly decided and unconstitutional.

The plaintiffs argue that because FLSA unequivocally provides for the recovery of damages from states who have violated the FLSA provisions, the state courts must award such damages when violations are proven. They argue that FLSA, as federal law, is supreme under the Supremacy Clause and must be enforced by state courts. Some federal courts have suggested in dicta that such is the case. In *Wilson-Jones v. Caviness*, 99 F.3d 203, 211 (6th Cir. 1996), the court dismissed a FLSA action by

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(1991). In *Morris* the issue was whether state sovereign immunity could be asserted in a Jones Act case. *Hilton* held that FELA and the Jones Act created a cause of action against states enforceable in state courts. Although the actual holding in *Morris* has been modified by *Hilton*, the proposition in *Morris*, that states look to Eleventh Amendment law to elucidate the states' sovereign immunity law, was not disturbed.

Hilton is a difficult case to place in the framework of the Court's Eleventh Amendment jurisprudence, except to recognize, as did Justice O'Connor in her dissent, that hard cases make bad law. 502 U.S. at 207. The majority's particularly heavy emphasis on stare decisis is perhaps the only way to explain the case. It certainly seems contrary to the holding in *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989) which basically held that if you can't sue a state or state official in a § 1983 claim in federal court, you can't do so in state court either. *Hilton* itself emphasizes that it is a case of pure statutory interpretation, not constitutional interpretation. Whether *Hilton* remains good law after *Seminole* is questionable. *Hilton* claims to recognize the "federalism-related concerns that arise when the National Government uses the state courts as the exclusive forum to permit recovery under a congressional statute." Writing for the majority, Justice Kennedy stated that it was desirable to have a symmetry which makes a state's liability or immunity the same in both state and federal courts, but that symmetry could not override expectations that had been built upon stare decisis.

state employees against Ohio on Eleventh Amendment grounds and stated: "[S]tate employees may sue in state court for money damages under the FLSA, and a state court would be obligated by the Supremacy Clause to enforce federal law." *See also Aaron v. State of Kansas*, —— F.3d ——, No. 96-3095 (10th Cir., June 17, 1997). The Tenth Circuit cites to Justice Marshall's concurring opinion in *Employees of Dep't. of Pub. Health & Welfare v. Department of Pub. Health & Welfare*, 411 U.S. 279, 298 (1973), in which he stated that state courts have an independent constitutional obligation to enforce employees' rights under FLSA. While dicta from the federal courts cannot be ignored, it cannot be considered controlling particularly when the courts did not analyze the precise issue.

The Supremacy Clause argument would be persuasive but for the fact that it can only be applicable where the federal legislation is authorized. We now know that Congress does not have the power to abrogate Eleventh Amendment immunity, except when acting pursuant to the Fourteenth Amendment, and FLSA was not enacted under the Fourteenth Amendment. *Mills*, No. 96-1973, 1997 WL 361186. Thus, Congress did not have the power to abrogate Eleventh Amendment immunity in FLSA. Because Congress did not have the power under the Commerce Clause to abrogate Eleventh Amendment immunity and because state sovereign immunity is synonymous with Eleventh Amendment immunity, Congress did not have the power to abrogate the immunity of states to be sued for damages in their own courts, without their consent.[7] Therefore, the Supremacy Clause does not come into play.

This court concludes that the Maine cases compel a ruling in this action that the plaintiffs are barred by the

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[7] A state trial court in Wisconsin has come to the same conclusion in a FLSA action against a state agency. *German v. Wisconsin Dep't of Transp.*, Docket No. 96-DV-1261, (Circuit Court, Branch 2, March 11, 1997).

doctine of sovereign immunity from collecting damages from Maine in this case. There being no claim for which relief can be granted, judgment must be granted for the State of Maine.

ORDER and JUDGMENT

The motion of the defendant State of Maine for judgment on the pleadings is granted. Judgment is granted to the defendant State of Maine.

/s/ Susan Calkins
SUSAN CALKINS
Superior Court Justice

Dated: July 18, 1997